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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JEFFERY BREON GRAY, Defendant and Appellant.	C047540 (Super. Ct. No. 02F06430)

After the initial jury deadlocked, resulting in a mistrial, a second jury convicted defendant Jeffery Gray of second degree murder. It also sustained an allegation that he personally and intentionally used a handgun to cause the death of the victim. The trial court sentenced him to state prison.

The defendant contends that the trial court violated his right to a speedy trial; allowed the prosecutor to exercise an illicit peremptory challenge; improperly admitted evidence of prior acts of domestic violence against the victim and evidence related to his juvenile adjudication for voluntary manslaughter; ineffectually responded to prosecutorial misconduct; incorrectly

instructed the jury in various regards; did not follow the proper procedure in receiving the jury's verdict; and violated his right to be present at court proceedings. We shall affirm.

FACTS

A

The primary prosecution witness was the victim's most recent roommate, with whom she had come to live a couple of weeks before the murder. On the day of the shooting, the victim had returned home in the late afternoon with a car that the roommate's father had rented. She asked the roommate to come along with her while she drove the defendant home (who was outside in the car). This was the first time that the roommate had met the defendant.

The victim drove to an apartment complex. She explained to the defendant that they had to return the car to the roommate's father. The defendant refused to get out of the car. The victim went into the apartment complex and returned with the defendant's cousin, who joined the roommate in the back seat. The victim drove around, seemingly aimlessly. Eventually, they returned to the apartment complex. The defendant still would not leave the car; he told the victim that the roommate and cousin could follow her in the defendant's car.

The victim continued to drive with no apparent destination. It appeared to the roommate that the victim and the defendant were having an argument. Eventually, the cars stopped at a gas station, at which point the victim told her roommate that she

wanted to go to the cemetery to see the grave of her mother, after which they would go to a restaurant to eat.

When they got to the cemetery, they followed a road to the rear. The victim got out of the car, carrying only a purse, and walked quickly toward the fence. The defendant got out of the car holding a small black gun. He started walking toward the victim. The roommate could see his hands make the motion of cocking the gun.

The defendant tried to grab the victim's neck. She shrugged him off but he took hold of her. The two of them struggled. The roommate did not see the victim's hand on the gun at any point. The music was on in the car and the windows up, so the roommate could not hear anything. As the victim broke away from the defendant, the roommate heard the sound of a shot. The victim staggered away. The defendant walked back to the car with the purse and gun in hand, and told his cousin and the roommate that someone needed to get the victim to a hospital. The roommate ran to the victim and dragged her (without assistance from the men) to the rental car, but could not get her inside. She demanded the keys and the victim's purse from the men. Unable to summon assistance on a cell phone, she decided to drive to the nearby home of her grandmother to make the call.

The bullet entered the victim's neck and exited the right side of her back in essentially a straight line. The angle of the wound indicated it had been fired from someone standing over the victim, or shooting at a bent-over victim. The bullet

perforated a major vein to her heart and two of the three lobes of her right lung. Her chest cavity was filled with a quart of blood. Her blood-alcohol level was .05, and a significant amount of methamphetamine was in her system. There was also a pipe in her pocket.

A resident of an apartment complex bordering the cemetery was in the process of taking laundry in two or three trips to his car. He heard what sounded like a young woman nearby who was crying, gasping, and gurgling. It sounded as if she was saying, "[W]hy is this happening? Why are you doing this to me? Why? Don't leave me here. I don't want to die." At first he had not paid much notice because he had heard mourners keening on other occasions, but there was something that caught his attention. He could see two cars in the cemetery, but no people were visible outside of them. When he returned from the laundromat shortly afterward and learned police were going through the complex, he sought them out to tell them what he had heard.

According to a detective who acted as an investigator of the crime scene, the evidence closely corroborated the roommate's account (which he had not heard before writing his report). An ejected unfired casing was near where the roommate said she saw the defendant cock the gun, a pool of blood was near where she said the victim fell, and there were blood drops along where she said she had dragged the victim. He also found an expended bullet; the angle at which it had hit the ground was

consistent with it passing through the torso of someone bent over somewhere between fully horizontal and fully upright.

B

The defense strategy paralleled that of defense attorney Billy Flynn in *Chicago*. (Kander & Ebb (1975) "We Both Reached For The Gun.")[1] Defendant's cousin testified that after the victim had been driving around making stops (which he assumed were related to selling drugs), he followed her in the other car to the cemetery. As he pulled up behind the rental car, he could see the victim and the defendant already struggling over a gun. The victim was holding the handle and the defendant had hold of the barrel. The gun went off in a matter of seconds after he arrived. A witness[2] picnicking near his aunt's grave some 450 feet away stated that the defendant was not holding anything when he got out of the car to follow the victim. There was something in the victim's right hand that he assumed was a gun because the defendant backed off when she raised it. They began to struggle over whatever was in her left hand, and the witness claimed he heard the defendant ask if the victim was going to shoot him. Then there was a shot. The defendant and a woman from the other car appeared to be helping the victim

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[1] "Oh yes, oh yes, oh yes, we both--/Oh yes, we both--oh yes, we both reached for/The gun, the gun, the gun, the gun. Oh yes, we/both reached for the gun, for the gun."

[2] This witness, described as homeless, was unavailable for the retrial. The parties read the transcript of his testimony from the first trial into the record.

toward the cars. He could not see the body on the ground from his location; assuming all was well, he went to get food at a nearby store. On his return, he saw the police. He had gotten a ride to court from the defendant's girlfriend.

The defendant testified. He had known the victim since childhood. Although they had been in a sexual relationship that produced a child, he did not consider her a girlfriend. She had been a drug abuser since age 13, and he acted as the wholesaler for her drug enterprise. He was unhappy that her use of drugs during her pregnancy with what he assumed was his child resulted in dependency proceedings. They had spent the day calling on the victim's customers, adding the roommate and the cousin (and the defendant's car) to their party as the day progressed. The victim had been irritable with the defendant as they drove, believing him to have sequestered their child. She announced that she wanted to return to the cemetery (having already visited it earlier in the day with the defendant). At the cemetery, she walked toward her mother's grave. The defendant got out of the car to follow her. He did not have a gun, and denied making any motion resembling the cocking of a gun. When he tried to guide her back to the car, she pulled out a gun. They struggled over it for about a minute before it discharged accidentally. He did not intend at any time to shoot her. She did not say anything akin to what the witness heard in the neighboring apartment complex.

DISCUSSION

I

A

At the request of defense counsel, the court set a date for retrial in July 2003 following the mistrial. The parties jointly requested a continuance to allow the reporter time to prepare the transcript of the first trial; the court set it for August 2003. Shortly before that date, defense counsel again asked for a continuance (over the defendant's objection), as the transcript would not be ready for another couple of months; he also stated that he was in trial in another case and there were no other attorneys available on the appointment panel to substitute for him. The court granted a continuance until October 2003.

At this point, the defendant fell victim to the demands on defense counsel's time. Transcript at last in hand, defense counsel asserted that he was presently in trial on another case (which involved six defendants and 68 counts) that would not be completed for another four months. There were no substitute attorneys available with sufficient experience on the appointment panel. Over the defendant's objection, the court set a date in January 2004 for the retrial. On that date, defense counsel sent a surrogate to request another continuance because his other trial still was not completed (and was not anticipated to be completed for another couple of months). Over the defendant's objection, the court granted another continuance until early March 2004. Before that date, defense

counsel returned to the court and obtained a short continuance until late March over the objection of the defendant.

On the date set, defense counsel appeared and asked "[t]o continue this matter because I am presently in [another] trial . . . on a preassigned matter. I would otherwise answer ready." The court granted a continuance until early May 2004. The court did not ask the defendant whether he had any objection.

Once again, defense counsel appeared at the time and place for trial and requested a continuance because his other matter was not yet completed. He stated that his first available date would be in late May. When asked, the defendant objected and moved to dismiss the case for violations of his right to a speedy trial. The court denied his motion and granted the requested continuance.

It was now the prosecutor's turn to request a continuance because he was in another trial. (Pen. Code, § 1050, subd. (g)(2).) The court granted the request. It denied another motion to dismiss from the defendant. Trial at last commenced on June 7, 2004.

B

Under California law, a defendant has the right to a speedy trial, which by statute must take place within 60 days unless the defendant requests or consents to a delay, or if there is good cause for the delay. (*People v. Johnson* (1980) 26 Cal.3d 557, 562-563 [plur. opn.].) Justice Tobriner, in a plurality opinion, concluded that defense counsel's obligations to other clients are not ordinarily good cause absent exceptional or

unforeseen circumstances ascertained on the record, and thus do not come within the category of good cause where the delay is for the defendant's benefit. (*Id*. at pp. 570-573.)

As the defendant concedes, good cause existed to postpone his retrial until his attorney had the opportunity to review the transcript of the first trial. However, for the seven months between early November 2003 and late May 2004,[3] the delay was solely the result of his attorney's press of business. Nothing exceptional or unforeseen appears in the record; there were simply insufficient legal resources to proceed with both the defendant's case and the cases of his attorney's other clients.

Nevertheless, a defendant must also show *prejudice* from a violation of his right to a speedy trial under California law. (*People v. Wilson* (1963) 60 Cal.2d 139, 151-152.) The sole prejudice to which the defendant points in the present case (other than the generic complaint about the effect of the passage of time on his ability to defend) was the absence of live testimony from the homeless witness, contending this forced him to testify in his own behalf. He does not, however, identify any factual basis in the record for this causal relationship. His citation to cases in which prejudice was present is also inapposite, as it involves situations *unlike* the present in which no testimony whatsoever was available in the stead of an absent witness. (*People v. Lawson* (2005)

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[3] We also exclude the continuance to which the prosecutor was entitled under statute.

131 Cal.App.4th 1242, 1246-1247; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 790-792.) We will not indulge the speculation that the jury was unimpressed with evidence received without a first-hand opportunity to view the absent witness. Finally, given the fact of his conviction, his lament about enduring time in jail awaiting retrial has little impact, as it simply delayed his transfer from local to state custody.

C

Under federal law, a violation of a defendant's right to a speedy trial is assessed through consideration of four factors: the length of the delay, the reason for the delay, the extent to which the defendant asserted his interest in a speedy trial, and any prejudice which resulted. (*Doggett v. United States* (1992) 505 U.S. 647, 651 [120 L.Ed.2d 520]; *People v. Anderson* (2001) 25 Cal.4th 543, 603.) Only delays approaching one year trigger this evaluation. (*Doggett*, *supra*, 505 U.S. at p. 652, fn. 1.)

Again, the inability to review the transcript of the first trial until late October outweighs any speculative prejudice to the defendant; even taking this period into account, the total delay after the mistrial barely implicates the federal right to a speedy trial. Any violation of his federal right to a speedy trial consequently does not mandate a reversal.

II

During voir dire, a prospective juror described herself as a lawyer who had interned during law school with the Attorney General and the Supreme Court (primarily with the late Justice Broussard); after graduation, she had worked as an editor for a

legal publisher and as a prosecutor for the State Bar. She was presently on inactive status, working as an administrative assistant at the corporate offices of Raley's Market. Two of her relatives had worked in law enforcement. A great aunt in another state was murdered by a boyfriend when the prospective juror was a little girl. She believed that she could resist the urge to play legal expert during deliberations.

After the prospective juror was seated in the jury box, defense counsel repeatedly passed. The prosecutor exercised three peremptory challenges before thanking and excusing the prospective juror at issue.

After a brief recess, defense counsel took issue with the peremptory challenge to the prospective juror. "The record should reflect that [she] appeared to be African[-]American, and I simply can't think of a racially mutual [*sic*; presumably he meant "neutral"] reason why [she] would have been excused." He disputed her legal education as a valid basis for challenge. The prosecutor declined to respond because he did not believe this single challenge to a racially distinct prospective juror could establish a prima facie case of discriminatory intent. The court denied the defendant's mistrial motion because this was the only challenge to a racial minority, and because generally litigators tend to exclude people with legal training from juries.

The exclusion of a member of a cognizable group violates the right to equal protection under the federal Constitution and the right to a representative cross-section of the community on

a jury under the state Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 86-87 [90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) At the outset, a party contesting the exercise of a peremptory challenge must produce evidence sufficient to permit an inference of a discriminatory intent. (*Johnson v. California* (2005) 545 U.S. ___, ___ [162 L.Ed.2d 129, 139].) Merely pointing to a single excused juror's membership in a cognizable group, without more, is ordinarily insufficient to establish this inference. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1201; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536.) In the present case, all defense counsel relied on was the ethnicity of the prospective juror and his disbelief in the validity of challenging people with legal training. However, as the trial court noted, litigators regularly excuse people with legal training from jury panels, whether from insecurity, a fear of undue dominance in deliberations, or a reluctance to risk the imparting of improper information to other jurors. The defendant does not identify any other juror with a legal education who sat on the jury in this case; therefore, the circumstances do not give rise to a reasonable inference of improper motive and the trial court properly denied the motion for a mistrial for want of a prima facie case.

III

Over defense objections, the trial court admitted four hearsay statements of the victim to two friends about instances

of domestic violence on the part of the defendant toward her. The defendant contends this violated his right to confrontation.

A

The victim moved in with a friend from childhood upon being released from prison in 2001. The defendant spent the night with the victim on several occasions. Within a month after the victim moved in, the friend observed scrapes, which the victim told her were the result of the defendant pushing her out of a car. Once, during a phone conversation with the defendant, the victim handed the phone to her friend, who heard the defendant angrily threaten to kill the victim because she had used drugs while pregnant with what the defendant believed to be his child, and this resulted in the declaration of a dependency for the infant. The victim told her this was part of a recent pattern of increasingly aggravated threats. Finally, a month or so before her death, the friend found the victim crying in the bathroom and bleeding from her mouth; she said the defendant had "socked" her.[4]

The victim's roommate at the time of the shooting also testified that the victim jumped out of the rental car at one point (while the roommate had been following in the other car) because the defendant had hit her in the head with a gun. The victim was angry and on the verge of tears. The roommate had not noticed any physical confrontation between the victim and

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[4] The defendant denied ever throwing the victim out of a car or punching her in the mouth.

the defendant when following them, and did not observe any marks on the victim's head.[5]

The prosecutor sought admission of these incidents as prior acts of domestic violence (Evid. Code, § 1109), and sought to overcome the hearsay problems through reliance on the exceptions for an excited utterance and inflicted or threatened physical injury of a declarant (*id*. at §§ 1240, 1370). The defendant registered a continuing objection to the lack of foundation for finding a sufficient relationship between the defendant and the victim (*id*. at § 1109, subd. (d)(3)) and to a violation of his right of confrontation under *Crawford v. United States* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*).

B

At the threshold, the defendant renews his objection under *Crawford* to a violation of his right to confront witnesses. He misapprehends the reach of *Crawford*.

Crawford considered the interplay between the right of confrontation under the federal Constitution and the rules of hearsay, noting that the former would condemn evidence that is otherwise admissible under exceptions to the latter if it is nonetheless akin to the abuses under British common law at which the constitutional provision was aimed. (541 U.S. at pp. 50-51.) Thus, regardless of whether hearsay evidence is admissible pursuant to an exception, a "testimonial" extrajudicial statement is admissible only if the witness is unavailable and

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[5] The defendant denied striking her with a gun.

the defendant had a previous opportunity to cross-examine the witness. If the extrajudicial statement is *not* testimonial, then the ordinary principles of hearsay apply. (*Id*. at pp. 59, 68.) Here, the defendant never had the opportunity to cross-examine the victim about these extrajudicial statements to her friends. Thus, the question is whether the statements were testimonial in nature.

Crawford itself refused to give a comprehensive definition of "testimonial." (541 U.S. at p. 68 & fn. 10.) It did note the existence of different ways of formulating the principle, among which was a broad definition that the National Association of Criminal Defense Lawyers (NACDL) urged in an amicus brief: statements made under circumstances reasonably leading to a belief that they would be available for use in a future trial. (*Id*. at pp. 51-52.) The defendant seizes upon this formulation to urge that the victim's statements to her friends were testimonial. We disagree. In its extensive discussion of the historical abuses that the right of confrontation addressed, *Crawford* repeatedly invoked the specter of solemn statements made to government officials engaged in ex parte investigations pursuant to the prosecution of an individual. Thus, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Id*. at p. 51.) Given this focus, we do not think it likely that *Crawford* was endorsing the broad reach of the proposed NACDL definition. We conclude the circumstances under which the victim made these

statements to her friends does not intrude upon the core concern of the right to confrontation, and thus are not testimonial.

The defendant also asserts that *People v. Sisavath* (2004) 118 Cal.App.4th 1396 applied *Crawford* to statements to a private party. The case is inapposite. It came to the unremarkable conclusion that the victim's complaints to a police officer about sexual abuse were testimonial. (*Id*. at p. 1402.) It also found that the victim's statements to a trained "'forensic interview specialist'" at a facility "designed and staffed for interviewing children suspected of being victims of abuse" *after* the initiation of charges were testimonial. (*Id*. at pp. 1400, 1402-1403.) This has no bearing on conversations with friends.

C

In order for statements relating to domestic abuse to come within the hearsay exception, they must (among other criteria) be contemporaneous with the infliction or threat of physical injury, trustworthy, and "made in writing" (or electronically recorded, or made to medical personnel or law enforcement officials). (Evid. Code, § 1370, subd. (a)(3)-(a)(5).) The defendant argues that the victim's statements to the witnesses do not satisfy these criteria, in particular the requirement of a writing or a recording.

As we have noted above, however, defense counsel did not object on these grounds in the trial court. He argued only that *Crawford* made the statements inadmissible in any event, and that the defendant and victim did not have a dating or engagement relationship. The defendant has forfeited this argument on

appeal. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428.)

Even if we accept the defendant's forfeited argument, there still is not any basis for reversing his convictions. The victim's statement to her current roommate about being hit in the head with a gun was a spontaneous statement, the roommate having laid an adequate foundation for its contemporaneous nature and the degree to which the blow had upset the victim; the absence of corroboration that the defendant identifies is immaterial (as are the musings contained in *Crawford* that he cites on the issue of spontaneous *testimonial* declarations). The same is true of the victim's statement to her former roommate when found bleeding from the mouth as the result of an attack from the recently departed defendant. The defendant's threats that the former roommate overheard on the phone are those of a party declarant. (Evid. Code, § 1220.) In light of the admissibility of these incidents, it is not reasonably probable that the defendant would have had a more favorable result if the other two incidents--for which we do not discern any applicable hearsay exception--had been excluded.

IV

A

The trial court ruled that the defendant could be impeached with his 1990 juvenile adjudication for the crime of voluntary manslaughter. During his cross-examination, the defendant admitted that at 15, he killed his mother's boyfriend because the latter was beating the defendant and his mother, and

thereafter served a term in the Youth Authority for voluntary manslaughter. The defendant now contends the court erred because voluntary manslaughter is not a crime of moral turpitude.

People v. Castro (1985) 38 Cal.3d 301 (*Castro*) held that a felony conviction is admissible to impeach the credibility of a witness "if the least adjudicated elements of the conviction necessarily involve moral turpitude." (*Id*. at p. 317.) It suggested that any difficulties of making this analysis "may be ameliorated by . . . considerable bodies of law concerning the characterization of felonies as involving or not involving moral turpitude" (and included a specific reference to case law involving deportations and attorney discipline). (*Id*. at p. 316, fn. 11.)

People v. Parrish (1985) 170 Cal.App.3d 336, 349-351, and *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106-1110, addressed this issue at length, concluding that voluntary manslaughter--which involves an intentional killing--reflected the necessary readiness to do evil amounting to moral turpitude. *Coad* found that case law involving attorney discipline[6] provided little guidance on this issue, because the narrow concern with the fitness to practice law does not reflect the policies underlying the impeachment of the credibility of a witness.

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[6] E.g., *In re Strick* (1987) 43 Cal.3d 644, 653-654 (a conviction for voluntary manslaughter does not reflect moral turpitude per se that mandates disbarment; the court must consider surrounding circumstances).

(181 Cal.App.3d at pp. 1105-1106, 1109.) Subsequent cases have relied on these decisions without disagreement. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435; *People v. Foster* (1988) 201 Cal.App.3d 20, 25; *People v. Partner* (1986) 180 Cal.App.3d 178, 187.)

The defendant simply disagrees with these decisions. For a different reason, we agree that we cannot simply apply them to the present case unthinkingly, because the premise of their analysis is no longer true. *People v. Lasko* (2000) 23 Cal.4th 101, 104, and *People v. Blakeley* (2000) 23 Cal.4th 82, 85, found that a person who knowingly acts with a conscious disregard for the life-endangering risk of his conduct[7] (or who does so under the influence of a sudden quarrel or the heat of passion) is properly convicted of voluntary manslaughter even if the death of the victim was *unintended*.

We do not, however, find this new least adjudicated element to be any less culpable than an intentional killing. A person who acts with callous indifference to the possibility of killing another reflects a readiness to do evil and thus might logically be found to be callously indifferent to the importance of telling the truth in a judicial proceeding. Thus, we still find that a conviction for voluntary manslaughter is admissible to

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[7] In the classic formulation, one who throws a potted palm off the roof of a building without looking to see if anyone is on the sidewalk below acts with an "abandoned and malignant heart." (Pen. Code, § 188.)

impeach the credibility of a witness because it involves moral turpitude even if the underlying death was not intentional.

B

The defendant contends that the fact of his juvenile adjudication could not be used to impeach him in any event. He relies on *People v. Lee* (1994) 28 Cal.App.4th 1724, which held (after it harmonized earlier cases) that the juvenile adjudication *itself* is never admissible for impeachment, but the *conduct* underlying the adjudication is admissible for impeachment if the defendant was not honorably discharged from Youth Authority parole. (*Id*. at pp. 1738-1740.)[8]

In this case, the Youth Authority dishonorably discharged the defendant (as we note in section V). His testimony about the conduct underlying his adjudication was thus admissible.

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[8] The case with which *Lee* wrestled, *People v. Sanchez* (1985) 170 Cal.App.3d 216, 218-219, had concluded that the language in the state Constitution which provides that "Any prior felony conviction of any person in any criminal proceeding, *whether adult or juvenile*, shall subsequently be used without limitation for purposes of impeachment" (Cal. Const., art. I, § 28, subd. (f), italics added) did not apply to juvenile adjudications. In dictum two years earlier discussing the potential consequences of the required express finding on the nature of a wobbler juvenile offense, the Supreme Court indicated otherwise; "the potential for prejudice from a finding of felony status has been increased [because the state Constitution] provides that any prior felony conviction, whether adult or juvenile [can be used subsequently to impeach]." (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619, fn. 3; cited (again in dictum) in *In re Manzy W.* (1997) 14 Cal.4th 1199, 1208-1209.) However, the Supreme Court denied review in *Sanchez*. As we find the error harmless, there is no need to decide whether *Sanchez* (and thus *Lee*) was correctly decided.

To the extent that he also testified about the fact of his adjudication, the admission of this evidence is harmless. The defendant's credibility was already called into question by the conduct underlying the adjudication; the incremental datum served only to apprise the jury that a court had found this conduct to be of a mitigated nature. No bias unrelated to his guilt thus resulted.

C

Finally, the defendant contends that the trial court abused its discretion in allowing use of the juvenile adjudication to impeach him. The criteria which inform the exercise of the court's discretion include whether the prior offense reflects on the veracity of the witness (which we have already answered in the affirmative), the degree of temporal remoteness, the degree of similarity to the present offense, and whether the potential for impeachment would prevent the witness from testifying (which is not a factor in the present case). (*Castro*, *supra*, 38 Cal.3d at pp. 307, 312.)

Although the defendant's criminal offense occurred 12 years before the present offense,[9] it is not the mere passage of time but whether the previous offense represents a divide between conduct detrimental to his veracity and a subsequent blameless record. (*People v. Green* (1995) 34 Cal.App.4th 165, 183 [no

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[9] The defendant would seek to take advantage of the two-year delay between his offense and the start of his second trial in characterizing the prior offense as remote. We find this time period is not material to the analysis of remoteness.

abuse of discretion in allowing use of 20-year-old conviction where followed by a pattern of criminal conduct].) The defendant was initially released from Youth Authority custody in 1994, but his parole was revoked three times before his dishonorable discharge from parole in 1999 when he turned 25. At the time of the offense in 2002, he had been a gang member and a drug dealer. The trial court did not abuse its discretion on the issue of remoteness.

As for similarity, the prior offense was not "identical" because the motivation was significantly different, to the defendant's credit: defense of himself and his mother, albeit through the use of excessive force. Because it is not an abuse of discretion even to admit several exactly identical offenses (*People v. Castro* (1986) 186 Cal.App.3d 1211, 1216), the trial court's decision is within the bounds of reason under this criteria as well.

We conclude the trial court did not abuse its discretion. As a result, we do not need to consider the defendant's claim of prejudice.

D

In a brief filed after oral argument, the defendant contends the trial court erred in failing to provide, sua sponte, an instruction limiting the jury's use of this evidence to impeachment of his veracity. He maintains that without such a limiting instruction the jury likely treated this evidence as an additional instance of the prior acts of domestic violence (which we discussed in the previous section) from which to infer

a disposition for violence. He then contends that the absence of a limiting instruction was not harmless beyond a reasonable doubt because the jury's deliberations were lengthy (16 hours) and the jury in his previous trial did not reach a verdict (where it was unaware of the prior conviction). For several reasons we reject this contention.

First, nothing in the argument of either counsel would have suggested to the jury that it could consider this evidence as another incident of domestic violence. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 699 (*Cuevas*) [in deciding how reasonable juror would interpret instructions, may consider arguments of counsel].)

Second, nothing in the instruction would indicate to a reasonable juror that it applies to the homicide of a mother's paramour. (*Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316] (*Boyde*); *People v. Kelly* (1992) 1 Cal.4th 495, 525 (*Kelly*).) As the instruction on the use of evidence of other incidents of domestic violence explains, "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in th[is] case. [¶] Domestic violence means abuse committed against *an adult . . . who is a* [*current or former*] *spouse . . .* [*or*] *cohabitant . . . , or person with whom the defendant has . . . a child or . . . has* [*a present or former*] *dating . . . relationship*." (Italics added.) It would be clear to the reasonable juror that the relationships to which the definition applies are all species of romantic

involvements, and thus the reasonable juror would not extract "cohabitant" in isolation (as the defendant proposes) and conclude that it refers to anyone with whom the defendant had ever lived, such as his mother's abusive partner.

Finally, even if there were like-minded jurors who viewed the instruction as does the defendant, or who otherwise felt free to make use of his prior juvenile homicide for purposes other than impeachment, the error is harmless beyond a reasonable doubt. The jury was otherwise aware that in general, the defendant was hardly an upstanding member of the community. In particular, the numerous instances of domestic violence he committed against the present victim cast a dark shadow over his claim of an unintentional shooting. The homicide conviction, as we just noted in the previous subsection, came in a context that was arguably more favorable to the defendant than his acts of violence against the victim. The length of the present jury's deliberations (and its ability to reach a verdict, unlike the prior jury) could be the result of any number of variables, and we will not speculate that this evidence was the superseding cause.

V

Although the trial court allowed the prosecutor to inquire into the facts underlying the defendant's juvenile adjudication, it specifically ruled that the violations of the defendant's juvenile parole were excluded. Nonetheless, the prosecutor asked the defendant whether he had been dishonorably discharged from parole; the defendant asserted it was because he was

unemployed. Defense counsel objected to the question, and the court struck the defendant's answer. Defense counsel shortly afterward expressed his concern that the prosecutor had raised the subject, but stopped short of moving for a mistrial. Despite the efforts of the prosecutor to justify his question, the court stated "it should not have been brought up." After talking with his client, defense counsel requested a special instruction. The trial court declined to give the instruction as defense counsel had drafted it, but with defense counsel's assent instructed the jury as follows in the course of the pattern instructions on objections and the nonevidentiary status of the attorneys' questions: "In this case, in a question, it was . . . asked about the defendant being dishonorably discharged from parole. The state of the law at that time was that a defendant at the age of 25 is discharged from parole. The fact that he was dishonorably discharged may have to do with programs or other things that occurred, but this question and this fact . . . was stricken by the Court and should not be considered for any purpose in this case."

The defendant contends the inadmissible information about his dishonorable discharge was irremediably prejudicial. We disagree. Contrary to the defendant's opinion, the testimony is not in the limited category of evidence for which admonitions are deemed ineffective (such as the inculpatory statement of a codefendant); it is otherwise necessary to presume that a jury heeds instructions and admonitions, lest we court judicial anarchy. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211

[95 L.Ed.2d 176]; *Francis v. Franklin* (1985) 471 U.S. 307, 324 [85 L.Ed.2d 344]; *Bruton v. United States* (1968) 391 U.S. 123, 135 [20 L.Ed.2d 476].) As we reject his premised error, we do not need to consider his analysis of prejudice.

VI

The defendant makes several challenges to jury instructions. We collect them under this heading, starting off each subsection with a quote of the particular instruction at issue.

A

"The phrase 'conscious disregard [for] life' as used in this instruction [on voluntary manslaughter] means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life."

The defendant contends this instruction is circular because the definition concludes with the phrase to be defined. He also faults the failure to include this definition in the instruction on the elements for implied-malice second degree murder.

The circularity is mere surplusage. Up to that point, the instruction properly informs the jury that implied malice, i.e., a conscious disregard for life, exists if one intentionally commits an act dangerous to life even with the knowledge of the potential consequences.

As for the absence of an express definition of the term "conscious disregard" in the instruction on implied malice for second degree murder, the essential concept is communicated of an intentional dangerous act deliberately committed despite knowledge of the dangerous consequences.[10] Read in context, there is nothing technical or confusing about the expression "conscious disregard" (nor does the defendant identify any authority requiring further definition of it) and there is no indication of confusion on the part of any of the present jurors. It is simply a differently phrased instruction than the newer instruction on voluntary manslaughter. Neither the prosecutor nor defense counsel devoted anything more than a passing mention to the concept of implied malice (their competing theories being either first degree murder or an unintentional shooting).

B

"When a person commits an act . . . through misfortune or by accident or under circumstances that show neither criminal intent nor purpose, nor criminal negligence, he does not thereby commit a crime."

The defendant contends the trial court erred because it failed to provide a further definition of criminal negligence

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[10] To paraphrase the cumbersome punctuation of the actual instruction, murder of the second degree is also the unlawful killing of a human being when it results from an intentional act, the natural consequences of which are dangerous to human life, deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

sua sponte. (E.g., *People v. Brucker* (1983) 148 Cal.App.3d 230, 239.)

The error is harmless because the jury necessarily rejected any theory of accident. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277 (*Dieguez*).) In sustaining the firearm enhancement, the jury found that "the defendant himself must have intentionally discharged it." This makes any flaw in the accident instruction immaterial.

C

"In this case the defendant has testified to certain matters. If you find the defendant has failed to explain or deny any [prosecution] evidence . . . , which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that . . . inferences . . . unfavorable to the defendant are the more probable [to be drawn reasonably therefrom]. [¶] The failure of a defendant to deny or explain evidence against him does not by itself warrant an inference of guilt nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge . . . need[ed] to deny or to explain evidence against him, it would be unreasonable to draw an [unfavorable] inference . . . because of his failure to deny or explain [it]."

The parties dispute whether or not the defendant failed to explain or deny any prosecution evidence. The disagreement is

of no moment. Even if the instruction were not warranted, "we have not found a single case in which an appellate court found the error to be reversible under the *Watson* standard. On the contrary, courts have routinely found . . . harmless error." (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.) The reason for the dearth of reversals is apparent. If the defendant did not fail to explain or deny prosecution evidence, a reasonable juror would understand that the instruction did not apply.[11] Moreover, it does not otherwise direct any adverse inferences, and it contains language favorable to the defense. (*Ibid*.; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.) Nothing in the present record even suggests a prejudicial effect from the instruction.

D

"The specific intent and mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. [¶] However, you may not find the defendant guilty of the crime charged or find the allegation of a handgun use to be true unless the proved circumstances are not only . . . consistent with the . . . required specific intent and mental state, but . . . [also] cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any

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[11] The prosecutor reinforced this concept in his argument: "Just because an instruction is part of the packet doesn't mean it applies in this case, doesn't mean that you . . . give it much weight." (*Cuevas*, *supra*, 89 Cal.App.4th at p. 699 [consideration of argument of counsel proper].)

specific intent or mental state permits two reasonable interpretations, one of which points to [its] existence . . . and the other to its absence, you must adopt that . . . which points to its absence. [¶] If, on the other hand, one interpretation . . . appears to you to be reasonable and the other . . . unreasonable, you must accept the reasonable [one] and reject the unreasonable [one].”

The defendant argues that using this version of the general instruction on evaluating circumstantial evidence, which is employed where specific intent or mental state is the only element of an offense relying substantially on circumstantial evidence (*People v. Marshall* (1996) 13 Cal.4th 799, 849), was error because there was circumstantial evidence “related to issues in addition to the issue of [defendant’s] mental state or specific intent. For instance, the evidence that [the victim] said [defendant] struck her with a gun while in the car was circumstantial evidence that he had a gun when they arrived at the cemetery and he brought this gun to the grave site. The evidence that [the victim] recently lost her mother and her baby was circumstantial evidence that she was distraught and suicidal; hence it was likely that she, rather than [defendant], brought a gun to the grave site.” The defendant’s reply brief suggests other instances of so-called circumstantial evidence: testimony of the roommate that she saw a gun in the defendant’s hand (“circumstantial evidence that [defendant] not only intended to shoot [the victim] but . . . in fact, [shot her]”), testimony of the defendant and the homeless witness that the

victim pulled a gun on the defendant ("circumstantial evidence that [the victim] meant to shoot [defendant] or herself, and that the gun went off accidentally"), and testimony that the defendant made efforts to save the victim's life ("circumstantial evidence that [defendant] did not pull the trigger").

Much of this is merely corroborative evidence, or is in fact direct evidence. The focus of the argument of counsel was the credibility of the various witnesses and the degree to which their testimony supported the competing theories at trial. We therefore find it is not reasonably probable that there would have been a result more favorable to the defendant were the court to have instructed the jury that the principles on evaluation of circumstantial evidence could apply to issues other than the defendant's intent or mental state as well. (*People v. Bender* (1945) 27 Cal.2d 164, 175-176.)

E

As noted earlier, in the pattern instruction on malice (CALJIC No. 8.11), a jury is informed that malice is implied when a killing results from an intentional act that has natural consequences dangerous to human life, where a defendant deliberately performs the act with knowledge of this danger and a conscious disregard for it. Confronted with this instruction, the present jury asked the court to "define 'ACT' on page 33 - 8.11 (1-2-3)[. W]here does the 'ACT' start and

stop." After conferring with both counsel,[12] a substitute judge (the trial judge being unavailable) responded, "The facts demonstrate a course of conduct which led to the fatal event. When, if at all, the defendant formed the mental state defined in Instruction 8.11 is for you to decide as judges of the facts."

The defendant contends this response "implied there was no question at all about whether his act or acts caused [the victim]'s death"; "led the jury to believe the mental state of conscious disregard and the actus reus of murder need not coincide in time"; or failed to force "an election from the prosecutor or told the jury a finding of guilt could be based on more than one act, but only if the jurors agreed on what the act was." On the first two points, we do not find that reasonable jurors would interpret the supplementary instruction in that way. (*Boyde*, *supra*, 494 U.S. at p. 380; *Kelly*, *supra*, 1 Cal.4th at p. 525.) As for the latter point, the instruction was entirely correct: the present facts do not include discrete alternative acts on which to find liability for a homicide. The various scenarios the defendant presents in his brief are not those that counsel argued to the jury. The prosecutor argued a cold-blooded murder; defense counsel argued an accident during a struggle. Neither argued any act antecedent to the shooting as a basis for liability, and we reject the defendant's

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[12] No reporter was present on this day; the sole record is the clerk's minutes of the proceedings.

speculations that jurors reasoned in this fashion (which pay no heed to the finding on the firearm allegation). The events which occurred once the victim and the defendant got out of the car at the cemetery were part of one continuous transaction; thus, there was not any need for an election or a unanimity instruction. (*Dieguez*, *supra*, 89 Cal.App.4th at p. 275.)

F

The defendant suggests cumulative prejudice from the flaws he has identified in the instructions. As we have concluded that at most there are errors only on immaterial points, we do not find reversible error in the aggregate.

VII

Responding to the substitute judge's inquiry, the foreperson announced that the jury had reached a verdict. After reading the verdict, the court asked the individual jurors to raise their hands if the findings of guilt and of firearm use were their true verdict. The judge stated for the record that all jurors had raised their hands. Defense counsel declined when the court asked if he wanted further polling of the jury.

In an elevation of form over substance, we are confronted with the defendant's argument that this procedure was "'structural error'" requiring reversal without considering whether it was harmless error because it violated the statutory requirements for the jury to declare its verdict, and for making individual inquiry whether the verdict reflected each juror's decision. (Pen. Code, §§ 1149, 1163.)

Ignoring the absence of any request from defense counsel to poll the jury before the court asked for a show of hands, and additionally ignoring defense counsel's express waiver of any further polling of the jury, the defendant's contention on appeal is unpersuasive. The right to poll a jury is purely a creature of Penal Code section 1163, without constitutional underpinning in the federal charter. (*People v. Masajo* (1996) 41 Cal.App.4th 1335, 1340.) Consequently, the defendant is entitled to reversal *only* upon a *showing* that a more favorable result is reasonably probable in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) While the show-of-hands method of polling might be error (*Masajo*, *supra*, 41 Cal.App.4th at p. 1339; but compare with *People v. Galuppo* (1947) 81 Cal.App.2d 843, 851 [in which court established the degree of crime through show of hands], cited with approval in dictum in *People v. Bonillas* (1989) 48 Cal.3d 757, 770), the defendant does not identify any evidence of resulting prejudice. He thus fails to carry his burden on appeal. (*People v. Archerd* (1970) 3 Cal.3d 615, 643; *Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) Contrary to defendant's evident misapprehension, the failure of the People to respond to this argument does not entitle him to prevail,[13] as even the complete absence of a respondent's

[13] He cites *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1734, fn. 22, which finds that *the petitioner* failed to brief an issue and therefore forfeited its consideration.

brief does not require us to reverse without assessing prejudice. (*Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 80, fn. 2.)

As for the defendant's claim that the court violated the procedure for declaring a verdict because "the court did not ask the jurors collectively to confirm or dispute the foreman's representation [that they had reached a verdict]," he does not cite any case establishing any such requirement. In point of fact, "Under section 1149 of the Penal Code, when the jur[ors] have returned into court, and announced that they have agreed upon a verdict, they are required, *through their foreman*, to declare such verdict[.]" (*People v. Smalling* (1892) 94 Cal. 112, 119 ,italics added.) Consequently, individual inquiry of the jurors is not required under this statute.

VIII

The defendant's *first* supplementary brief argues that we must reverse the judgment because he was not present in person for discussions about jury questions or for the reading back of the prior testimony of the unavailable homeless witness. We are not persuaded.

Under federal and state law, a defendant's personal presence is required if necessary for effective cross-examination in a proceeding, or if the defendant could contribute to the fairness of a proceeding critical to the outcome of the trial, or if it would reasonably bear a substantial relation to the fullness of his opportunity to defendant himself. (*People v. Cole* (2004) 33 Cal.4th 1158, 1231.) The defendant does not articulate any basis for

concluding that his presence was necessary under the first criterion. As for the readback, the defendant admits that "[t]he reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant's opportunity to defend." (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.) His efforts to distinguish the reading back of a transcript of a reading back of the transcript from the previous trial do not convince us. Finally, the formulation of responses to the jury inquiries is a question of law resolved outside the jury's presence for which the defendant does not demonstrate that he reasonably could have provided meaningful input; as a result, his absence did not violate his right to be present. (*Id*. at p. 1122.)

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

SIMS, J.